

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-31849

PAUL B. RAJKOWSKI
d/b/a PBR SALES
d/b/a PARADISE GRILL @ LOUISVILLE LANDING
d/b/a PAULIE'S PIZZA AND GRILL

Debtor

BARBARA RAJKOWSKI

Plaintiff

v.

Adv. Proc. No. 02-3120

PAUL B. RAJKOWSKI

Defendant

MEMORANDUM

APPEARANCES: DENNA F. MIDDLETON, ESQ.
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, Barbara Rajkowski, on July 12, 2002, objecting to the Debtor's discharge under 11 U.S.C.A. § 727(a)(2), (3), (4), and/or (5) (West 1993). In the alternative, the Plaintiff seeks a determination by the court that a monetary award in her favor pursuant to the parties' divorce is nondischargeable under 11 U.S.C.A. § 523(a)(5) (West 1993 & Supp. 2004) since it was in the nature of alimony, maintenance, and support, or, in the event that the court determines the award constitutes a property settlement, that it is a nondischargeable marital debt under 11 U.S.C.A. § 523(a)(15) (West 1993 & Supp. 2004).

The trial was held on May 24, 2004. The record before the court consists of fifteen exhibits stipulated into evidence, along with the testimony of the parties and Jean Munroe, the Debtor's spouse. At the close of the Plaintiff's proof, the court dismissed all counts of the Complaint objecting to the Debtor's discharge under 11 U.S.C.A. § 727(a);¹ thus, the only remaining issue involves the nondischargeability of a debt pursuant to § 523(a)(5) or (15).

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The parties, who were married on April 28, 1968, were divorced on December 23, 1997, by virtue of a Final Decree entered in the Fourth Circuit Court for Knox County,

¹ The court ruled in the Debtor's favor on the § 727 issues as a matter of law pursuant to Federal Rule of Civil Procedure 52(c), but did not make detailed findings of fact and conclusions of law as required by this rule, because the Plaintiff did not oppose the Debtor's oral motion.

Tennessee (Divorce Court). The Final Decree incorporated into its terms the provisions of a Marital Dissolution Agreement executed by the parties. The Marital Dissolution Agreement states, in material part:

7. ALIMONY IN SOLIDO: The wife is awarded alimony in solido in the amount of \$135,000 to be paid in installments as follows: \$1500 per month commencing on the 15th day of October, 1997, in installments of \$750 on the 15th and 30th of each month thereafter for twenty-four months; then \$1000 per month commencing on the 15th of October, 1999, in installments of \$500 on the 15th and 30th of each month thereafter through December 30, 2007.

TRIAL EX. 1(d). Additionally, the Debtor was required to maintain a life insurance policy in the amount of \$250,000.00, with the Plaintiff as beneficiary, until her 65th birthday, along with an ordinary life policy of approximately \$7,000.00. See TRIAL EX. 1(d).

On January 3, 2001, the Plaintiff filed a Petition for Contempt in the Divorce Court, arguing that the Debtor had failed to pay the alimony *in solido* payments since November 2000, and he had indicated that he would not be paying the payments timely in the future due to his opening a new restaurant business. TRIAL EX. 1(f). On August 15, 2001, the Divorce Court entered an Order on Petition for Contempt, finding that the Debtor had cured all contempt prior to the hearing, but awarding the Plaintiff her attorney's fees and litigation expenses in the amount of \$1,147.50 associated with the contempt action. TRIAL EX. 1(g). After the Debtor failed to pay the attorney's fees and court costs, the Plaintiff filed a second Petition for Contempt on December 3, 2001, in which the Plaintiff also alleged that the Debtor failed to maintain the required life insurance. TRIAL EX. 1(h). The Divorce Court entered a second Order on Petition for Contempt on February 26, 2002, ordering the Debtor

to appear for a hearing on the second Petition for Contempt, with the date to be scheduled no earlier than March 1, 2002. TRIAL EX. 1 (i).

The Debtor filed the Voluntary Petition commencing his Chapter 7 bankruptcy case on April 5, 2002. In his original statements and schedules, the Debtor listed the Plaintiff as holding an unsecured priority claim in the amount of \$64,000.00, but disputing the “obligation, character, and amount” of the debt. See TRIAL EX. 3(c). The Debtor’s amended bankruptcy schedules list the Plaintiff as an unsecured nonpriority creditor, holding a contingent and disputed claim in the amount of \$65,000.00. See TRIAL EX. 3(i). In July 2002, the Plaintiff filed the Complaint initiating this adversary proceeding, arguing that the alimony *in solido* awarded to her pursuant to the Marital Dissolution Agreement and Final Decree (Marital Debt) is nondischargeable under § 523(a) (5) since it is in the nature of alimony or support. In the alternative, she avers that the Marital Debt is nondischargeable under § 523(a) (15) since, although he has chosen not to do so, the Debtor has the ability to pay, and because the detriment to her if the Marital Debt is discharged outweighs any benefit to the Debtor of its discharge.

II

At issue is the Plaintiff’s request for a determination that the Marital Debt awarded to her under the Final Decree is nondischargeable by the Debtor. The nondischargeability of debts is governed by 11 U.S.C.A. § 523, which provides, in material part:

(a) A discharge under section 727^[2] . . . of this title does not discharge an individual debtor from any debt—

. . . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

. . . .

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support[.]

. . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

² Chapter 7 debtors receive a discharge of pre-petition debts, “[e]xcept as provided in section 523 of this title[.]” 11 U.S.C.A. § 727(b) (West 1993). This accomplishes the goals of Chapter 7 to relieve “honest but unfortunate” debtors of their debts and allow them a “fresh start” through this discharge. *In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934)).

11 U.S.C.A. § 523(a). The party seeking a determination that a debt is nondischargeable under § 523(a) has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). Nonetheless, although § 523(a) actions are generally construed strictly in favor of debtors, in order to promote Congressional policies favoring the enforcement of spousal and child support obligations, proof in § 523(a)(5) actions is strictly construed in favor of any former spouses and/or children. *See Rouse v. Rouse (In re Rouse)*, 212 B.R. 885, 887 (Bankr. E.D. Tenn. 1997).

III

The Plaintiff argues that the Marital Debt in the amount of \$135,000.00 is nondischargeable under § 523(a)(5). Because the Debtor may discharge an award labeled as alimony if it is not actually in the nature of support, the bankruptcy court must make an inquiry into the intent of the Divorce Court in approving the award. *See Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1107 (6th Cir. 1983). Whether a debt constitutes alimony, maintenance, or support under § 523(a)(5) is a matter of federal law, but because these issues fall “within the exclusive domain of the state courts[,]” the bankruptcy court should also rely on state law in making its determination. *Calhoun*, 715 F.2d at 1107-08. The following three-part test is used within the Sixth Circuit to decide whether alimony, maintenance, or support is actually in the nature thereof: (1) whether the award was intended to be support; (2) whether the award was effectively support in light of the recipient

non-debtor's present needs; and (3) whether the award was "manifestly unreasonable under traditional concepts of support." *Calhoun*, 715 F.2d at 1109-1110.

When making this determination, if the state court has identified an award as alimony, maintenance, or support, the sole question before the bankruptcy court is "whether something denominated as alimony is really alimony and not, for example, a property settlement in disguise." *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 521 (6th Cir. 1993). Furthermore, a state court's designation of an award as alimony or support should be presumed to be such by the bankruptcy court, and the bankruptcy court should "look[] to the structure of an obligation only to determine whether it is in the nature of support." *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 403 (6th Cir. 1998).

"In determining whether an award is actually support, the bankruptcy court should first consider whether it 'quacks' like support," and look for the presence of "traditional state law indicia that are consistent with a support obligation" giving rise to the conclusive presumption that the award is support. *Sorah*, 163 F.3d at 401. These indicia include, but are not limited to, the following: "(1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits." *Sorah*, 163 F.3d at 401. Other circumstances to be considered include "(1) the disparity of earning power between the parties; (2) the need for economic support and stability; (3) the presence of minor children;

and (4) marital fault.” *Luman v. Luman (In re Luman)*, 238 B.R. 697, 706 (Bankr. N.D. Ohio 1999) (citing *Singer v. Singer (In re Singer)*, 787 F.2d 1033, 1035 (6th Cir. 1986)).

If a non-debtor spouse establishes the presence of “traditional state law indicia” and satisfies the burden of proof, it shifts to the debtor to prove the third prong of the *Calhoun* test; i.e., that “although the obligation is of the *type* that may not be discharged in bankruptcy, its *amount* is unreasonable in light of the debtor spouse’s financial circumstances.” *Sorah*, 163 F.3d at 401. In making a reasonableness determination, the bankruptcy court must give deference to the state court’s findings of fact. *Sorah*, 163 F.3d at 403. If the state court has “clearly structured the obligation as support[,]” any additional fact-finding is “inappropriate,” and a debtor may not “introduce evidence regarding the resources, earning potential, and daily needs of the non-debtor spouse, either at the time the obligation arose or at the time of the bankruptcy proceeding.” *Sorah*, 163 F.3d at 401-02. If the bankruptcy court finds an award is unreasonable, it may discharge the debt only “*to the extent* that it exceeds what the debtor can reasonably be expected to pay.” *Sorah*, 163 F.3d at 402. “Section 523 obviously places no limitation upon a state court’s ability to award alimony, maintenance, or support, and the bankruptcy court should not second-guess the state court support award absent evidence that the burden on the debtor spouse is excessive.” *Sorah*, 163 F.3d at 402 (citations omitted).

Because the Marital Dissolution Agreement states that the Debtor is to pay alimony *in solido* in the amount of \$135,000.00 to the Plaintiff, the court must first examine state law to

determine if the award is actually support and nondischargeable under § 523(a)(5). Alimony is awarded by Tennessee courts to assist a disadvantaged spouse to become self-sufficient and mitigate the “harsh economic realities of divorce.” *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1999). When awarding alimony, the most important factor to be considered by the trial court is the need of the spouse receiving the award, followed next by the ability of the obligated spouse to pay the award. *Houghland v. Houghland*, 844 S.W.2d 619, 621 (Tenn. Ct. App. 1992). Relevant factors to be considered by the trial court include, among others, relative earning capacity, relative education and training, the health of each party, the duration of the marriage, the parties’ separate assets, the division of marital property, the standard of living established during the marriage, the relative fault of the parties to the divorce, and any other factors “as are necessary to consider the equities between the parties.” See TENN. CODE ANN. § 36-5-101(d)(1)(E) (2003); *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002).

Deference must be given to the labeling and structure of an alimony award ordered by a state court. See *Sorah*, 163 F.3d at 401; *Fitzgerald*, 9 F.3d at 520-21. Although *Sorah* does not require this court to limit its examination to the “traditional state law indicia” expressly enumerated in that decision, the ultimate determination hinges upon whether the award designated as “alimony *in solido*” was actually to be used for the support and maintenance of the Plaintiff.

Here, there is no dispute that the Marital Dissolution Agreement provided for payment of the Marital Debt directly to the Plaintiff in specific monthly payments. Other traditional

indicia of support, however, are not present. First, the Divorce Court did not make a finding that the Plaintiff was in need of support, nor did the Divorce Court actually order the payment of alimony to the Plaintiff. The parties willingly entered into the Marital Dissolution Agreement, and both were represented by competent counsel, who negotiated the terms of the divorce. There are no contingencies such as remarriage or death placed upon the alimony *in solido* award; instead, the Marital Dissolution Agreement provides for monthly payments to the Plaintiff to be phased out and eventually end after ten years. The Marital Dissolution Agreement also states that the Debtor will maintain life insurance in an amount to pay not only the entire \$135,000.00 but an additional \$115,000.00 to the Plaintiff. Furthermore, neither party has claimed the payments as alimony for income or deduction purposes on their respective tax returns. See TRIAL Ex. 5.

Also determinative for the court is the fact that the Plaintiff did not use the Marital Debt award payments received from the Debtor for her maintenance and support. The Plaintiff testified that she received payments from the Debtor until late 2000 or early 2001. During that time, the Plaintiff spent some of the payments received to pay for living expenses; however, she saved a majority of the money received, resulting in her greater net worth now than at the time of the divorce. The Plaintiff works for the Department of Children's Services for the State of Tennessee, making approximately \$27,000.00 per year, and she has been employed with this department for thirteen years. At the time of the parties' divorce, she owned 100 shares of All-America stocks, most of which she has since sold to pay for her daughter's wedding, house repairs, and dental work. Nevertheless, the Plaintiff conceded that

she has not used the award for her maintenance and support, and thus, under Tennessee law, she has not demonstrated a “need” for alimony. *See Houghland*, 844 S.W.2d at 621. Because the Marital Debt is not in the nature of alimony, maintenance, or support, the § 523(a) (5) inquiry ends. *See Calhoun*, 715 F.2d at 1109.

IV

In the alternative, the Plaintiff argues that the award is nondischargeable under § 523(a) (15), under which she must prove that the Marital Debt is not of the kind described in § 523(a) (5) and that it was incurred in the course of a divorce. *See* 11 U.S.C.A. § 523(a) (15); *Crawford v. Osborne (In re Osborne)*, 262 B.R. 435, 439 (Bankr. E.D. Tenn. 2001). Then, the burden shifts to the Debtor to prove “one of the affirmative defenses set forth in § 523(a) (15) (A) or (B).” *Osborne*, 262 B.R. at 439; *see also In re Crosswhite*, 148 F.3d 879, 886 (7th Cir. 1998). The Debtor’s burden of proof is likewise by a preponderance of the evidence. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998).

It is undisputed that the Marital Debt award falls within the definition of § 523(a) (15) as having been “incurred by the debtor in the course of a divorce . . . or in connection with a . . . divorce decree” 11 U.S.C.A. § 523(a) (15). Accordingly, the burden is on the Debtor to prove either his inability to pay the Marital Debt or that discharge of the debt would result in a benefit to him that outweighs any detriment to the Plaintiff.

A

Section 523(a)(15)(A) requires the court to ascertain whether the Debtor has any disposable income, after paying all monthly expenses reasonably necessary to support himself and his dependents, that can be used to pay the Marital Debt. See § 523(a)(15)(A); *Calabrese v. Calabrese (In re Calabrese)*, 277 B.R. 357, 361 (Bankr. N.D. Ohio 2002). An inability to pay requires a showing by the Debtor that he is presently unable to pay and will be unable to pay in the future. *Molino*, 225 B.R. at 908. On the other hand, if the Debtor “has sufficient disposable income to pay all or a material part of a debt within a reasonable amount of time,” he has the ability to pay as contemplated by § 523(a)(15). *Osborne*, 262 B.R. at 444 (quoting *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996)).

To ascertain future earning potential, the court should consider the Debtor’s present income, prospective earning capacity as of the trial date, employment history and future opportunities, and health status. See *Molino*, 225 B.R. at 908; *Osborne*, 262 B.R. at 443. The court may also consider the following factors:

1. The debtor's “disposable income” as measured at the time of trial;
2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor's burden of debt will be lessened in the near term;
4. The extent to which the debtor previously has made a good faith effort toward satisfying the debt in question;

5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor's dependents and the continuation, preservation and operation of the debtor's business, if any;
8. The income of debtor's new spouse as such income should be included in the calculation of the debtor's disposable income;
9. Any evidence of probable changes in the debtor's expenses.

Crossett v. Windom (In re Windom), 207 B.R. 1017, 1021-22 (Bankr. W.D. Tenn. 1997). In short, for the purposes of this section, disposable income can be defined as “that income which is received by the debtor and which is not reasonably necessary to be expended for the support or maintenance of the debtor or for a dependent of the debtor.” *Erd v. Erd (In re Erd)*, 282 B.R. 620, 625 (Bankr. N.D. Ohio 2002); *see also Windom*, 207 B.R. at 1021 (because the language is almost identical, the appropriate standard for determining a debtor’s ability to pay is the “disposable income test” set forth in 11 U.S.C.A. § 1325(b) (2) (West 1993 & Supp. 2004)).

Additionally, if the Debtor “artificially diminishes his ability to repay obligations addressable under § 523(a) (15), such conduct becomes a factor appropriately considered by the bankruptcy court in a § 523(a) (15) proceeding.” *Molino*, 225 B.R. at 908. In other words, a debtor may not voluntarily become under-employed in order to meet the inability to pay standard. *See, e.g., Molino*, 225 B.R. at 907-08 (holding that the debtor’s voluntary decision to forego his previous well-paying occupation to instead work at a restaurant for

approximately \$90.00 per week and to assist his new spouse with her dog grooming business without pay did not establish an inability to pay); *Helsel v. Marsh (In re Marsh)*, 257 B.R. 879, 882 (Bankr. W.D. Tenn. 2000) (stating that “the Court understands [the debtor’s] desire to improve his own standard of living, but the Court may not assume, absent proof, that [he] is incapable of obtaining a higher-paying job that would both improve his lot and permit easier payment of these two debts.”); *Johnson v. Rappleye (In re Rappleye)*, 210 B.R. 336, 341 (Bankr. W.D. Mo. 1997) (holding that the debtor was not “prohibited from [taking a non-paid voluntary charitable position], but he cannot do so in order to render himself a pauper in an effort to avoid the lawful support obligations ordered by the [state] court, or while seeking the protection of the bankruptcy court as a means to avoid those support obligations.”).

Likewise, a debtor’s monthly expenses should be considered. See *Sacher v. Gengler (In re Gengler)*, 278 B.R. 146, 151 (Bankr. N.D. Ohio 2002); *Calabrese*, 277 B.R. at 361-62. The court “is not required to accept, at face value, a debtor’s itemized expense, but is rather under a duty to scrutinize a debtor’s expenses so as to ensure that such expenses are reasonable.” *Gengler*, 278 B.R. at 151. “Reasonably necessary expenses are those that are adequate, not first class or luxury items.” *Hammermeister v. Hammermeister (In re Hammermeister)*, 270 B.R. 863, 877 (Bankr. S.D. Ohio 2001). Along those lines, “although not expected to live in poverty, [debtors are] expected to tighten their financial belt, and thus do without many amenities to which they may have otherwise become accustomed.” *Courtney v. Traut (In re Traut)*, 282 B.R. 863, 869 (Bankr. N.D. Ohio 2002). Accordingly, the court must also ascertain whether the Debtor’s expenses are either unreasonable or unnecessary.

Finally, if the court finds that the Debtor does have the ability to pay, it must then determine if he can realistically pay the award within a reasonable time. See § 523)(a)(15)(A); *Gengler*, 278 B.R. at 150-51 (citing *Miller v. Miller (In re Miller)*, 247 B.R. 412, 415 (Bankr. N.D. Ohio 2000)). There are no guidelines in the Bankruptcy Code for determining what constitutes a reasonable time, but other courts have found that repayment of debts ranging from five to eight years fits the requirement. See, e.g., *Erd*, 282 B.R. at 626-27 (five years was a reasonable time to repay approximately \$7,000.00); *Gengler*, 278 B.R. at 152 (six years was a reasonable time to repay approximately \$21,000.00); *Cox v. Brodeur (In re Brodeur)*, 276 B.R. 827, 835 (Bankr. N.D. Ohio 2001) (more than eight years was a reasonable time to repay approximately \$22,000.00); *Pino v. Pino (In re Pino)*, 268 B.R. 483, 501 (Bankr. W.D. Tex. 2001) (five years was a reasonable time to repay approximately \$20,000.00); *Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 776 (Bankr. N.D. Ohio 2001) (eight and one-half years was reasonable time to repay approximately \$51,000.00); *Oswald v. Asbill (In re Asbill)*, 236 B.R. 192, 196-97 (Bankr. D.S.C. 1999) (period of three to five years was reasonable time to repay \$5,000.00).

Here, the court believes that the Debtor has the ability to pay the Marital Debt. The Debtor, who is 63 years old, appears to be in good health and presented no evidence to the contrary. Although he holds a business degree from St. Mary's University and has, for the majority of his adult life, worked in sales, he is currently employed as a cook with Puello's

Grill in Knoxville, earning \$23,000.00 per year.³ While the Debtor testified that he did not anticipate staying in his current position if a better opportunity arose, he acknowledged that he has not attempted to find other employment, citing his age and his unwillingness to relocate as factors therefor. Regardless of the reasons why, the Debtor is voluntarily underemployed and is in no apparent hurry to find other, higher paying employment within his field of expertise.

Additionally, the Debtor in February 2002 remarried. His wife, Jean Munroe, is a licensed attorney and mediation trainer. At trial, she testified, and the Profit/Loss Statement attached to her 2002 tax return confirmed, that she earned \$129,591.00 during 2002, which resulted in net income after expenses of approximately \$65,000.00. See TRIAL EX. 8(a). She also testified that she has not prepared her 2003 taxes, but she anticipates that her net income was at least \$50,000.00 from the mediation training alone. Additionally, Ms. Munroe's financial statement as of January 20, 2004, was introduced into evidence. See TRIAL EX. 8. This document reflects a net worth for Ms. Munroe of \$14,266.00. As of that date, her total assets, including one-half ownership in her house, a SEP account, two automobiles, household furnishings, and cash on hand, totaled \$64,746.00. TRIAL EX. 8. Her liabilities, totaling \$21,380.00, included the following: (1) \$8,900.00 for 1999 taxes; (2) approximately \$6,000.00 for 2002 taxes; (3) approximately \$13,000.00 for 2003 taxes; (4) employee taxes for 2002-2003 in the estimated amount of \$1,200.00; (5) \$6,157.00 owed

³ The Plaintiff testified that at the time of the parties' divorce, the Debtor was the chief executive officer and sales manager for the company by which he was employed and was earning \$40,000.00 to \$50,000.00 annually. The Debtor did not dispute this testimony.

to Nordstrom; (6) \$1,300.00 owed to Sears; (7) \$900.00 owed to Home Depot; (8) \$476.00 owed to Lowes; (9) \$1,982.00 to a credit union; (10) \$6,000.00 owed to her brother; (11) \$3,451.00 for a printer lease; and (12) a printer service contract in the amount of \$1,114.00.

TRIAL Ex. 8.

The Debtor and Ms. Munroe also submitted a Joint Budget, reflecting the following monthly expenses:

Mortgage	\$1,400
Car	414
Sam's	300
Nordstrom's	300
Sears	300
Lowe's	100
Home Depot	300
IRS installment	
(1999 taxes)	200
UTFCU equity	708
UTFCU line of credit	173
Estimated taxes	1,500
Health insurance	266
Car insurance	170
Clothing	200
Food	500
Life insurance	13
Gas & maintenance	250 (Saab needs clutch - \$1500)
Firestone	150
Books, magazines,	
Newspapers	50
<u>Entertainment</u>	<u>25</u>
 TOTAL	 \$7,519

For January 2004, unusual expenses included travel to daughter's wedding and payment for wedding breakfast, total expenses approximating \$4,100.00.

TRIAL EX. 7(a). Finally, Ms. Munroe's Projected Business Expense Budget for her mediation training evidences monthly expenses of \$1,220.00. See TRIAL EX. 7(b).

At trial, Ms. Munroe testified that she has monthly expenses of approximately \$5,700.00, and the Debtor has monthly expenses of approximately \$1,800.00. Although they maintain separate accounts, Ms. Munroe stated that they do have a joint bank account from which they pay for food, utilities, and other joint bills. Along those lines, the Debtor testified that he contributes approximately \$600.00 monthly from his salary to pay for his and Ms. Munroe's car insurance, cellular telephones, home telephone, and food. However, the Debtor's Amended Schedule J evidences he has monthly expenses, other than regular expenses from the operation of a business, totaling \$1,035.00.⁴ See TRIAL EX. 3(k). He has no car payment, as he drives a paid-for 1995 Chevrolet Astrovan.

The Debtor does not dispute that he and Ms. Munroe have the present ability to pay their bills. On the other hand, they presented some evidence that they may not have a future ability to pay. First, the Debtor does not currently have medical insurance. He testified that he is currently attempting to obtain coverage, as it is not offered by his employer. Additionally, Ms. Munroe testified that her mother, who is 94 years old, has extremely bad health, requiring Ms. Munroe to take time off to care for her and to incur medical expenses for her mother's support.

⁴ The Amended Schedule J evidences the following expenses, other than those from the operation of the Debtor's former restaurant business: (1) mortgage of \$320.00; (2) \$55.00 for telephone; (3) \$100.00 for food; (4) \$50.00 for clothing; (5) medical and dental expenses of \$374.00; (6) \$80.00 for transportation; (7) \$8.00 for recreation, clubs, entertainment, newspapers, magazines, etc.; (8) \$13.00 for life insurance; and (9) \$35.00 for auto insurance. TRIAL EX. 3(k).

The court recognizes that these are legitimate concerns; however, other factors must be considered. First, although the Debtor may incur the expense of medical insurance premiums in the future, he also testified that he has not sought other employment that offered health insurance. Second, while Ms. Munroe testified that she would be incurring additional expenses caring for her mother, she offered no proof as to the amounts that would be incurred.

The court also believes that some of the listed monthly expenses are not reasonable, will be paid off in a short time, and/or will be subject to discharge by the Debtor and should not be included in the calculation of disposable income. For example, the Joint Budget lists a monthly payment of \$300.00 to Sam's; however, this credit card account was listed in the Debtor's Amended Schedule F, and it is not listed as a liability of Ms. Munroe. *See* TRIAL EX. 3(i); TRIAL EX. 8. That debt will be discharged, freeing up \$300.00 from the Joint Budget. Additionally, the Debtor listed as unsecured creditors both Lowes and Sears, and although they have also been listed as liabilities of Ms. Munroe in differing amounts, at least the Debtor's obligation will be discharged. The court also notes that the Debtor and Ms. Munroe have listed monthly payments of \$300.00 to Nordstrom, Sears, and Home Depot for credit card balances of \$6,157.00, \$1,300.00, and \$900.00, respectively. Making these payments should result in payment in full of the Home Depot liability within approximately three months, payment of the Sears liability within approximately five months, and payment of the Nordstrom liability within approximately two years. Similarly, paying the \$476.00 Lowes liability at \$100.00 per month will result in payment in full within approximately five months.

As each of these liabilities is extinguished, the Debtor and Ms. Munroe will have more disposable income.⁵

In addition, Ms. Munroe testified that her brother pays one-half of the mortgage payment each month, in the amount of \$700.00. The court wonders how that testimony fits in with the documentary evidence presented; i.e., the Debtor's listing his mortgage payment at \$320.00 on his Amended Schedule J, compared with the Joint Budget listing a monthly mortgage payment of \$1,400.00, and finally, Ms. Munroe's Financial Statement evidencing a first mortgage balance of only \$7,478.00. *See* TRIAL EX. 3(k); TRIAL EX. 7(a); TRIAL EX. 8. The evidence appears to be in conflict. There is also some question in the court's mind regarding how the UTFUCU equity payment of \$708.00, presumably for the \$15,200.00 home equity loan, fits into the equation. *See* TRIAL EX. 7(a); TRIAL EX. 8.

Finally, entered into evidence are fourteen months of bank account statements for Ms. Munroe's "Business Essentials Checking Plus" account with AmSouth Bank. *See* TRIAL EX. 10. This account appears to be the account from which a majority of the household expenses were paid during this time period. Additionally, these bank statements evidence many eBay and other internet purchases, as well as numerous restaurant charges. While it is Ms. Munroe's prerogative to spend her income as she so chooses, by virtue of her marriage to the Debtor, she is bound by his assertions that he does not have the ability to pay the Marital

⁵ There is also a listing for \$150.00 per month to Firestone. The court is unsure what this constitutes.

Debt. Because her income must be considered, so too must any expenditures that could be construed as “frivolous.”

Upon receipt of his discharge, the Debtor will no longer be liable for approximately \$40,000.00 in nonpriority unsecured debt. See TRIAL EX. 3(i). In light of this fact, together with the evidence presented, the court finds that the Debtor has the present and future ability to pay the Marital Debt. Additionally, the Marital Debt should be paid in full within five to seven years, which the court finds is a reasonable time, especially since the parties originally agreed that the Debtor would make payments to the Plaintiff for a period of ten years. Nevertheless, even though the Debtor has the ability to pay, if he derives a greater benefit from discharging the Marital Debt than the Plaintiff would be damaged, the court will discharge the debt.

B

Section 523(a) (15) (B) allows discharge of a debt upon a showing that the benefit of discharge to the debtor outweighs any detriment to the former spouse if the debt is not discharged. The bankruptcy court should compare the financial condition and standard of living of each party to “determine the true benefit of the debtor’s possible discharge against any hardship the former spouse . . . would suffer as a result of a discharge.” *Osborne*, 262 B.R. at 444 (quoting *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33, 1997 WL 745501, at *3 (6th Cir. Nov. 24, 1997)); see also *Traut*, 282 B.R. at 870-71 (utilizing the standard of living test). In essence,

[i]f, after making this analysis, the debtor's standard of living will be greater than or approximately equal to the creditor's if the debt is not discharged, then the debt should be nondischargeable under the [§] 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the debt should be discharged[.]

In re Smither, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996).

The balancing test should be applied on a case by case basis, and the Sixth Circuit has adopted a list of factors to be considered by the bankruptcy court in making the comparison:

1. The amount of debt involved, including all payment terms;
2. The current income of the debtor, objecting creditor and their respective spouses;
3. The current expenses of the debtor, objecting creditor and their respective spouses;
4. The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
5. The current liabilities, excluding those discharged by the debtor's bankruptcy, of the debtor, objecting creditor and their respective spouses;
6. The health, job skills, training, age and education of the debtor, objecting creditor and their respective spouses;
7. The dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs which they may have;
8. Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
9. The amount of debt which has been or will be discharged in the debtor's bankruptcy;
10. Whether the objecting creditor is eligible for relief under the Bankruptcy Code; and

11. Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a) (15) issues.

Molino, 225 B.R. at 909 (quoting *Smither*, 194 B.R. at 111). Because this list is non-exhaustive, the court may entertain any or all of these factors in making its determination, as well as others such as whether the parties have incurred expenses for luxury goods and/or unnecessary services. *See, e.g., Traut*, 282 B.R. at 871. The Debtor bears the burden of proof that discharge of the award would provide him a benefit outweighing any detriment that discharge would cause to the Plaintiff. *See Osborne*, 262 B.R. at 439.

A determination of benefit versus detriment requires the court to make a comparison of the current income, expenses, assets, and liabilities of the parties. As already discussed in detail above, the Debtor is employed by Puello's Grill, earning an annual income of \$23,000.00, which is supplemented by Ms. Munroe's income of approximately \$65,000.00 per year, or roughly \$7,300.00 per month. They totaled their monthly expenses at \$7,519.00; however, as also discussed, the court believes that at least the \$300.00 Sam's expense will be discharged, and there are significant concerns with the accuracy of the amounts listed for other accounts and the mortgage.

On the other side, the Plaintiff is employed by the State of Tennessee. At trial, she confirmed, with minor changes, the accuracy of the monthly income and expenses listed for her on Trial Exhibit 11 submitted into evidence. According to this statement, the Plaintiff's monthly income and expenses are as follows:

Income	Monthly
Salary (Net)	\$1,516.00
Interest	40.00
Mileage	60.00
Bonus	90.00

Expenditures	Monthly
Mortgage	515.00
Home Maintenance	100.00
Home Taxes	80.00
Home Insurance	56.00
Auto Loan	176.00
Auto Insurance	64.00
Auto Upkeep and Fuel	100.00
Groceries/Sundries	275.00
Health Care	90.00
Prescriptions	120.00
Telephone	28.00
Cell Phone	72.00
Utilities	160.00
Recreation/Travel	10.00
Subscriptions/Memberships	2.00
Charitable Contributions	10.00
Parking	20.00
Life Insurance	20.00
Personal:	
Hair Cuts/Color	50.00
Stamps	7.00
Christmas/Birthday	30.00
Health Insurance	78.00
Dental Insurance	16.00
Disability Insurance	45.00
BFI Garbage	17.00
401-K	20.00
Cat - Pet Care	40.00
Total	<hr/> \$2,083.00

Before taxes, taken out of
my salary

TRIAL EX. 11. The Plaintiff has not remarried and does not have any additional supplemental income.

Additionally, the Plaintiff testified that she enjoys a higher net worth now than she did when the parties were divorced. The Plaintiff's Financial Statement introduced into evidence reflects the following:

Assets	
1. 401-K	\$17,317.00
2. Schwab	23,000.00
3. Ed Jones IRA	4,500.00
4. TVA - IRA	3,500.00
5. Fidelity Mutual	9,500.00
6. Savings Account	800.00
7. Household Furniture	
8. House Equity	65,000.00
9. Face Value Life Insurance	
Total	<hr/> \$124,817.00
Liabilities	
Mortgage	\$66,000.00
Auto Loan	8,450.00
Total	<hr/> \$74,450.00

TRIAL EX. 12. According to this document, the Plaintiff has a net worth of \$50,367.00. The Plaintiff also testified that she is in the process of receiving an inheritance of stock and other non-liquid assets with a total value of between \$75,000.00 and \$100,000.00.

Clearly, the Debtor and Ms. Munroe have a higher monthly income than does the Plaintiff. Notwithstanding Ms. Munroe's income, however, the Plaintiff's annual income is \$4,000.00 per year higher than the Debtor's income. The primary difference, however, is that

the Plaintiff has been employed with the same state department for thirteen years, while the Debtor is admittedly under-employed. The Debtor also has higher expenses than does the Plaintiff, by more than \$5,400.00. Additionally, neither the Plaintiff nor the Debtor have minor children that they support.

The Plaintiff testified that since the divorce, she has been forced to sell stocks and take money out of savings in order to pay for her daughter's wedding,⁶ house repairs, and dental work. She is 62 years old and suffers from high blood pressure and gastric reflux. Additionally, she testified that she sees a therapist. She also testified that it would be an undue hardship if she was not paid the Marital Debt, that she would be unable to maintain her mortgage payments, and would be forced to sell her house. Finally, the Plaintiff testified that she cannot afford to visit two of her three grown children that do not live locally.

The Plaintiff did not offer a great deal more than conclusory statements regarding how nonpayment of the Marital Debt would be detrimental to her. Nevertheless, the burden of proof is not on the Plaintiff, but on the Debtor, to prove that he would better benefit from discharge than the Plaintiff would suffer. That he has not done. Other than offering evidence regarding his income and expenses, the Debtor provided no proof that his benefit of discharge outweighed the Plaintiff's detriment. Therefore, after balancing the above-referenced factors, and based upon the testimony at trial, the court finds that any benefit of discharge to the Debtor does not outweigh the detriment to the Plaintiff of not receiving the balance of the Marital Debt.

⁶ Both parties testified that one of their grown children recently was married in the Virgin Islands.

In summary, the Defendant has failed to meet his burden of proof as to either § 523(a)(15)(A) or (B). Because the Marital Debt may not be discharged absent proof of one of these affirmative defenses by a preponderance of the evidence, the Marital Debt incurred by the Debtor pursuant to the Marital Dissolution Agreement and Final Decree entered by the Fourth Circuit Court for Knox County, Tennessee, on December 23, 1997, is nondischargeable.

A judgment consistent with this Memorandum will be entered.

FILED: June 3, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-31849

PAUL B. RAJKOWSKI
d/b/a PBR SALES
d/b/a PARADISE GRILL @ LOUISVILLE LANDING
d/b/a PAULIE'S PIZZA AND GRILL

Debtor

BARBARA RAJKOWSKI

Plaintiff

v.

Adv. Proc. No. 02-3120

PAUL B. RAJKOWSKI

Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. To the extent the Plaintiff objects to the discharge of the Defendant/Debtor under 11 U.S.C.A. § 727(a)(2), (3), (4), and/or (5) (West 1993), her Complaint is DISMISSED.
2. To the extent the Plaintiff seeks a determination of the nondischargeability of a debt under 11 U.S.C.A. § 523(a)(5) (West 1993 & Supp. 2004), her Complaint is DISMISSED.

3. To the extent the Plaintiff seeks a determination that the Defendant's obligations to pay her "Alimony in Solido" in the amount of \$135,000.00 under the terms of paragraph 7 of the parties' Marital Dissolution Agreement incorporated into the Final Decree entered on December 23, 1997, in the Fourth Circuit Court for Knox County, Tennessee, in the action styled *Paul B. Rajkowski v. Barbara K. Rajkowski*, Docket No. 76740, is nondischargeable under 11 U.S.C.A. § 523(a)(15) (West 1993 & Supp. 2004), her Complaint is SUSTAINED. The \$135,000.00 "Alimony in Solido" obligation of the Defendant/Debtor is nondischargeable under the terms set forth in the state court Final Decree.

ENTER: June 3, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE